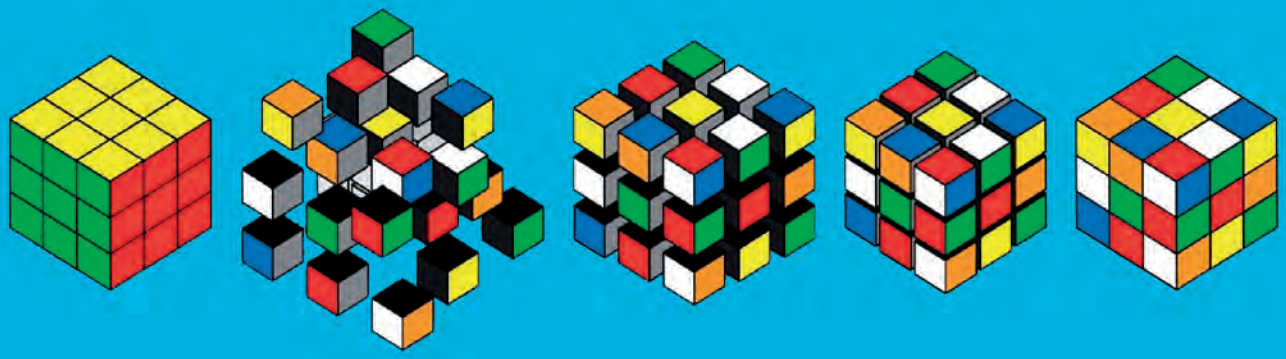
The Minnesota Association of Criminal Defense Lawyers

Challenger

FALL 2012



Double Issue

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Challenger Contents

MACDL Challenger / Fall 2012

Challenger is published two to three times a year by MACDL, a Minnesota nonprofit corporation. Its mission is to advance the advocacy skills of MACDL members, to inspire and motivate aggressive, ethical,and effective defense for all accused, and to connect the criminal defense community in Minnesota.

Features

Departments

Issue Editor's Column

Ryan Garry

"No two on earth in all things can agree.
All have some daring singularity."
~Winston Churchill.

This issue of the *Challenger* discusses various topics that are becoming ever more prevalent in our line our work. Instead of requesting articles that center around one topic, as usual, we wanted this issue to explore views from the many windows looking out into the ever-changing world of criminal defense.

As assistant Federal Defender **Caroline Durham** points out, more and more frequently, prosecutors are turning to DNA to strengthen their cases. Her article explores why you should become familiar with DNA, how to request the full forensic file, and explains what in the world a "loci" is and how they relate to the graphs located in the BCA discovery. In essence, "we got your client's DNA on the gun" is not as it seems. Last year, Manny Atwall and I tried a federal bank robbery jury trial, and Caroline successfully cross examined the government's DNA expert… I can assure you she knows exactly what she is talking about.

As each day passes, social networking sites, such as *Facebook*, *LinkedIn*, *Twitter*, and *MySpace*, are playing larger and more important roles in the defense of our clients. As the law rushes to keep up with the changes in technology, forensics examiner **John Carney** and Hamline law student **Stephanie Losching** point out that criminal defense attorneys are also behind the times. Prosecutors, they explain, have been much quicker on the uptake in utilizing *Facebook*. From *Facebook's* privacy controls to the ethics of "friending" witnesses or other parties, this article illustrates the importance of and the unethical actions to avoid when using *Facebook* as part of the defense strategy.

Sarah MacGillis and **Eric McCool** provide perspective on *U.S. v. Jones*, a case that deals with the Fourth Amendment and the Supreme Court's ongoing battle to balance what is acceptable in police intrusion on privacy. The article gives a brief history of Fourth Amendment case law and reminds us that although the law is rooted in precedent, its future is unclear given the technological advances in society.

You are not alone in your frustration with the procedure in which police test for intoxication! **Jeff Ring** shares his views on blood, urine, and breath testing. He explains the process of how alcohol travels through our bodies and how this affects the tests that result in DWI charges. He analyzes why the test law enforcement chooses matters, and how the different tests result in drastically different results. He explains that "close enough for Jazz" is not the right standard by which to convict our clients and brand them with "the Scarlet D."

Attorney **Adam Johnson** discusses *State v. Fleck*, a Minnesota Supreme Court case from February dealing with assault, mens rea, and defenses. This article walks through the various assault crimes, types of intent, and the voluntary intoxication defense to show us the nuanced, and sometimes counter-intuitive, side of the law. We are reminded that it is important to study the difference between general and specific intent as the lack of intent defense is often incorrectly argued.

Finally, **Andrew Birrell** has discussed why becoming a *Criminal Law Specialist* certified by the Minnesota State Bar Association should be important to you and how you can distinguish yourself as a specialist by meeting the *Minnesota State Bar Association* requirements for certification. So far, only 44 criminal lawyers have been certified in Minnesota. Why have you not?

We hope you enjoy this issue of the Challenger.

Ryan

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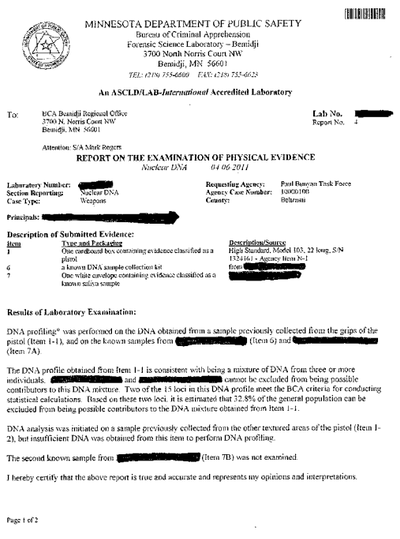
DNA: Understanding the Basics of the Case File

Caroline Durham

More and more frequently, prosecutors are turning to DNA in hopes of strengthening their cases. For many defense lawyers, their eyes gloss over at the mere mention of DNA. Others immediately pick up the phone and hire an expert to read the file and tell them how to proceed. The goal of this article is to provide guidance for those unfamiliar with forensic DNA. What do you do when a prosecutor says, "We've got your client's DNA on the gun?" or you receive a one-page report from the BCA that seems to indicate your client left remnants at the crime scene.

The Report: What Does It Really Mean?

Typically, you will receive as part of the discovery in a case a one or two page report.



MINNESOTA DEPARTMENT OF PUBLIC SAFETY
Bureau of Criminal Apprehension
Forensic Science Laboratory – Bemidji
3700 North Norris Court NW
Bemidji, MN 56601
TEL: (218) 755-4000 FAX: (218) 755-4023

An ASCLD/LAB-*International* Accredited Laboratory

To: BCA Bemidji Regional Office
3700 N. Norris Court NW
Bemidji, MN 56601

Lab No. [redacted]
Report No. 1

Attention: S/A Mark Rogers

REPORT ON THE EXAMINATION OF PHYSICAL EVIDENCE
Nuclear DNA 04/06/2011

Laboratory Number: [redacted]
Section Reporting: Nuclear DNA
Case Type: Weapon

Requesting Agency: Paul Bunyan Trak Force
Agency Case Number: 10000100
County: Beltrami

Principals: [redacted]

Description of Submitted Evidence:

Item	Type and Packaging	Description/Source
1	One cardboard box containing evidence classified as a pistol	High Standard, Model 103, .22 long, S/N 1324161 • Agency Item No 1
6	a known DNA sample collection kit	from [redacted]
7	One white envelope containing evidence classified as a known saliva sample	[redacted]

Results of Laboratory Examination:

DNA profiling* was performed on the DNA obtained from a sample previously collected from the grips of the pistol (Item 1-1), and on the known samples from [redacted] (Item 6) and [redacted] (Item 7A).

The DNA profile obtained from Item 1-1 is consistent with being a mixture of DNA from three or more individuals. [redacted] and [redacted] cannot be excluded from being possible contributors to this DNA mixture. Two of the 15 loci in this DNA profile meet the BCA criteria for conducting statistical calculations. Based on these two loci, it is estimated that 32.8% of the general population can be excluded from being possible contributors to the DNA mixture obtained from Item 1-1.

DNA analysis was initiated on a sample previously collected from the other textured areas of the pistol (Item 1-2), but insufficient DNA was obtained from this item to perform DNA profiling.

The second known sample from [redacted] (Item 7B) was not examined.

I hereby certify that the above report is true and accurate and represents my opinions and interpretations.

Page 1 of 2

The report provides very limited information. The basics include: what items were tested; what lab tested them; and which lab tech conducted the testing. This information is important because you will, likely, want to meet with the analyst to review their work with them. The report also lays out the basics of the comparison of DNA samples taken from items connected to a crime to the DNA of your client. This part of the report will typically provide the following information:

1. When the items were compared to your client, how many loci matched;
2. The statistical analysis of the results as compared to the general population.

So, what is a loci? Forensic DNA is comprised of 15 loci. Each loci is an identifier for the DNA. The more loci that match between your client's DNA and the unknown sample, the greater the statistical likelihood that your client is a contributor of the unknown DNA sample. Each loci is comprised of 2 alleles. One way I look at these terms is to say, okay, there are 13 points (loci) that are found on the DNA sample. For each point (loci), there are two numbers (the alleles). When the two numbers (the alleles) from the unknown sample match the two numbers (the alleles) at that same point (loci) on my client's DNA, it is bad. The more loci that match between the client's DNA and the unknown DNA, the more problems the defense will have to address.

So, how can do you challenge the evaluation to show there is reasonable doubt that your client is the contributor of the unknown DNA sample? Start first with the report. Then, remember, the report is a summary of a much larger lab file. According to your report, how many loci match? Remember, there are 15 loci. If only 6 loci match, then you've got 9 that don't match.

There is much more information underlying that report.

The Complete Case File

You must obtain the full forensic file from the lab. This step is simple. In a letter to the prosecutor, request the file. It's that simple. You will want to include some specifics, including: the disk containing the raw data; the case or bench notes; lab protocols; chain of custody logs; all correspondence between the lab and any law enforcement/prosecutor; a copy of the "unexpected results" file. The prosecutor may be unfamiliar with the requests you are making. The lab will not be.

The Raw Data

When you receive the lab's case file, there will be a gold disk that looks like a regular CD or DVD. However, you cannot read this file on your computer. It requires a special machine. You want to have it in case you determine that you want an independent analysis done on the raw data. For now, set it aside.

The Bench/Case Notes

The lab analyst is required to write down each of the steps taken in the processing and analysis of the DNA samples. Typically, the notes start with the examination of the object from which the unknown sample will be gathered. The notes should include information about where on the object the "swab" for DNA was taken, and the notes should follow through the steps leading to the reading of the DNA's loci.

Approach your review of the bench notes as you would a crime scene. Look for any items that seem out of place. For example, items of significance might be a notation that there was blood on the *outside* of the evidence envelope, or a comment that the evidence bags were not sealed. Such information can be used to show the unknown sample was contaminated and, therefore, the final comparison to your client's DNA is unreliable.

Summary Tables

The summary table is a presentation of the alleles for each loci. It is an organization of the information gathered from the graphs (described below). Important items to look for on the tables:

- Loci that do not match. If there is a loci of your client that does not match the unknown sample, your client should be ruled out. In other words, the analyst should find that your client did not contribute to the unknown sample.

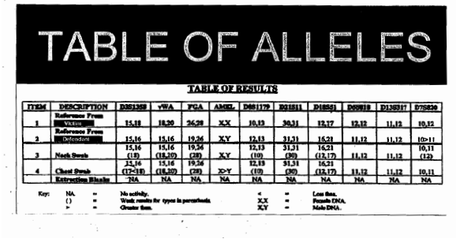


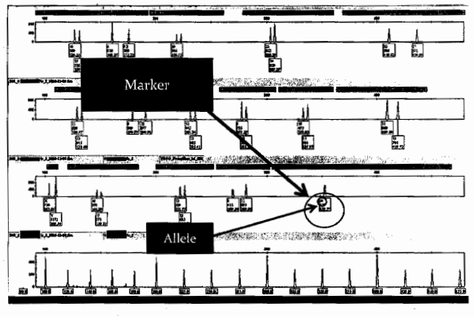
TABLE OF ALLELES

TABLE OF RESULTS

ITEM	DESCRIPTION	D3S1358	vWA	FGA	AMEL	D8S1179	D21S11	D18S51	D5S818	D13S317	D7S820
1	Reference From [redacted]	15,18	18,20	24,28	X,X	10,13	30,31	12,17	12,12	11,13	10,12
2	Reference From [redacted]	15,16	15,16	19,24	X,Y	12,13	31,31	14,21	11,12	11,13	10+11
3	Mark Swab	15,16 (10)	15,16 (18,20)	19,24 (28)	X,Y	12,13 (10)	31,31 (30)	14,21 (13,17)	11,12	11,13	10,11 (12)
4	Chest Swab (125ul)	15,16 (18,20)	15,16 (18,20)	19,24 (28)	X+Y (10)	12,13 (30)	31,31 (33,17)	14,21	11,12	11,13	10,11
	Extraction Blanks	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA

Key: NA = No activity. () = Weak results for types in parenthesis. - = Greater than. < = Less than. X,X = Female DNA. X,Y = Male DNA.

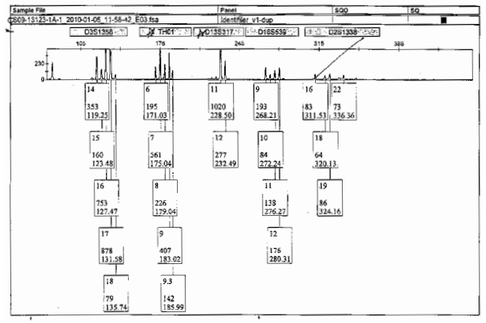
- Loci that have more than 2 alleles. Remember, a loci only has 2 alleles. Where a loci has more than 2, there is a mixture of DNA or there is more than one person contributing to the DNA sample.



- Loci that have only 1 allele. A single allele can mean many things, which can be argued to show your client is innocent. For example, if at one loci, say the D16S539 loci, the only allele is "11." If your client's D16S539 loci is "11,10" he could be ruled out as a contributor to the unknown sample.
- Another issue that may be indicated by a single allele is problems with the quality of the DNA sample. A single allele may mean that the sample is weak or degraded. The bottom line: a single allele has numerous possible explanations. That mere fact may be enough to create reasonable doubt.

Graphs

When you receive the lab file, you will find pages that look like this:



These graphs provide the information that is found in the Summary Table described above. When you take a close look at the graphs, you will see the label for each loci. Under each loci label, there are peaks. The peaks should be identified with markers that include the allele. When the Chart is comparing a particular loci with that same loci's label on the graph, you should find that alleles noted to be the same as the peaks identified in the graph.

There will be one set of graphs for each item tested. So, if there is one sample taken from a gun and a sample from your client, there will be two complete graphs. If there are several items tested, there will be several graphs.

On the graphs, you are able to see the strength of the alleles. The higher the peak, the stronger the reading of the allele – with a couple of caveats. There are limits on what qualifies as a useable or reliable peak. A peak that is too high may indicate problems with the sample, just as you find with a peak that is weak or low. The lab should provide you with the thresholds they used in their analysis. These thresholds are important for several reasons. First, they inform you of the guides the lab used in including or leaving out peaks.

There are two thresholds to keep in mind:

- **Analytical Threshold** is the lowest reading the DNA must reach in order to be considered reliable.
- **Stochastic Threshold** is the minimum strength or reading necessary for a peak to be considered reliable. If the peak is below this threshold, you must be concerned about the quality of the DNA.

These thresholds will not be marked on the graph. Using the numbers on the far left of the graph, you will be able to determine where the thresholds are.

The area of thresholds is ripe for cross examination. There are no industry standards for setting thresholds. They vary from machine to machine. The lab analysts set the thresholds in each separate case. Thus, there is room for human error in the setting of the "scientific" thresholds.

When reviewing the Graphs, look for any peaks that have not been labeled. The existence of a peak not labeled, or a series of peaks (however small), is worthy of exploration on cross-examination.

DNA Is Not All It Purports to Be.

Even in the initial steps of reviewing DNA lab reports, you may find evidence that is circumspect. The "We've got your client's DNA on the gun!" declaration of the prosecutor is not as it seems. A review of the laboratories full case file will help you identify the initial steps in your attack strategy. Gather the information, scour it, and prepare to attack the weaknesses that are found.

For additional information and resources on addressing forensic DNA, go to the **National Clearinghouse for Science, Technology and the Law (www.ncstl.org).**

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Traps to Avoid When Using Facebook Evidence For An Aggressive Criminal Defense

John Carney
Stephanie Losching

"If it weren't for Facebook, I'd still be on Riker's Island," said Rodney Bradford after his robbery charges were dismissed when his Facebook account proved that he could not possibly have been at the scene of the crime.[1] Bradford's defense attorney had utilized the social media giant of Facebook to prove an alibi for Rodney Bradford that he was updating his status on Facebook at the time of the crime.[2] Facebook and other social networking sites have been utilized by the prosecution to help in the conviction of criminal defendants including impeachment at trial based on evidence gathered. The Bradford case was one of the first cases where the defense realized they could level the playing field with the prosecution and went into Facebook to find their evidence.

Facebook statistics show an alarming growth rate worldwide with more than 901 million monthly active users;[3] which if active users were citizens, Facebook would be the third most populous nation in the world after China and India. But these rapidly advancing statistics come with opportunities for lawyers to make use of Facebook and other social networking sites to gather evidence regarding their cases. Prosecutors, together with law enforcement, realize these opportunities and have incorporated Facebook as one of their evidence gathering sources. Therefore, now more than ever, it is time for defense attorneys to level the playing field with prosecutors and begin to use Facebook evidence in their cases.

Facebook is a newfound necessity in criminal defense cases, but there are ethical and legal traps lawyers need to be aware of and adhere to before utilizing Facebook as a source of evidence. We will begin by exploring Facebook's privacy controls and how to gather information from Facebook for your cases. We will end by analyzing the legal ethics of Facebook and how to avoid an ethical or professional conduct dispute. As we have stated, Facebook is essential to your practice and the aggressive representation of criminal defendants. Leveling the playing field with the prosecution is crucial to success in future cases.

[1] John G. Browning, "The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law," pg. 215 (2010), Thomson Reuters/Aspatore.
[2] Id.
[3] Facebook.com, http://newsroom.fb.com/content/default.aspx?NewsAreaId=22 (last visited May 8, 2012).

Privacy Controls

Facebook is a world unto itself. Some say that Facebook is actually the "new confessional"[4] because of how much information is voluntarily available on the social networking site. The speed and breadth of the information amplify the communication velocity. Typically, the communication is rapid, short, and snappy and is rarely reviewed or proofread. Interpretation of communication on Facebook is typically left to the reader and most information lacks context and precise meaning.[5] Therefore, criminal defense attorneys are well positioned to find surprisingly relevant, incriminating, and powerful evidence for impeachment located on Facebook.

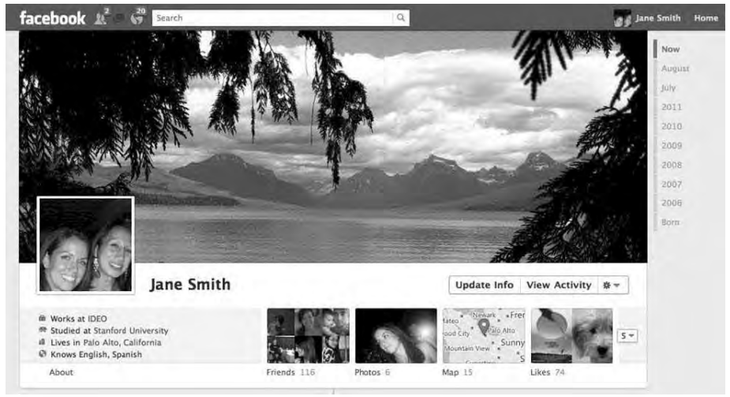
Facebook has many privacy controls, or settings, that each active user can edit, but the settings are forever changing and users often misunderstand them. This lack of clarity about privacy controls is the reason why about 200 million users resort to Facebook's default settings, which has the effect of positioning these users like an open book for everyone on Facebook, possibly everyone on the Internet, to see. The courts have been struggling with Facebook privacy in litigation in recent years. The *Mackelprang* court and others have held that there is no Facebook privilege when information has been shared, even if the audience was limited in scope.[6] An overall trend is becoming visible in the judiciary as it moves toward greater permissiveness of social media evidence in e-discovery and shows a strong likelihood that privacy concerns will be outweighed by the probative value and relevance of the information.[7] Since courts and prosecutors have already realized the benefits of Facebook, criminal defense attorneys also need to level the playing field by using Facebook in their evidentiary findings. To show how the prosecution is using social media today, a prosecutor from Los Angeles said,

> *As a prosecutor, the first thing I do when I get a case is to Google the victim, the suspect, and all the material witnesses. I run them all through Facebook, MySpace, Twitter, YouTube and see what I might get. I also do a "Google image search" and see what pops up. Sometimes there's nothing, but other times I get the goods – pictures, status updates, and better yet, blogs and articles they've written.*[8]

Two new Facebook features have been introduced recently that allow for more information sharing and evidence to be found. The first, "Frictionless Sharing," was created by Facebook so that when a Facebook user logs onto another web site using his or her Facebook user ID and password, and then accepts "sharing" even once, Facebook will post a status thereafter of any articles read, music listened to, or videos viewed onto that user's Facebook page. This over-sharing with many other web sites that Facebook users visit routinely enables communication to friends, friends of friends, and others the many interests and web sites these users have read, viewed, and variously interacted.

The second new feature is the Facebook Timeline in which Facebook tracks and displays a user's activity on Facebook chronologically by month and year for extremely easy access. This feature allows an attorney or investigator to quickly see all of that user's activity on the exact day, week, or month in question, providing for more efficient and

[4] Tarice L.S. Gray, "Facebook: the new confessional", August 16, 2011, Gray Current blog, http://graycurrent.com/?p=2079 (last visited May 13, 2012).
[5] Craig Carpenter, "Social Media & eDiscovery: More Bark Than Bite?" July 16, 2010, InfoRiskAware Blog, http://inforiskawareness.co.uk/social_media_ediscovery_more_bark_than_bite/ (last visited May 13, 2012).
[6] Mackelprang v. Fidelity National Title Agency of Nev. Inc., 2007 WL 119149 (D. Nev. 2007), Crispin v. Christian Audigier, Inc., (2010 WL 2293238 (C.D. Cal. May 26, 2010) (holding that if information is viewable to the public then it is not deemed privileged by the court).
[7] Thought Leadership Team, "Facebook Status: No Expectation of Privacy," February 9, 2011, Kroll Ontrack OnPoint Blog, http://www.krollontrack.com/blog/post/facebook-status-no-expectation-of-privacy.aspx (last visited May 17, 2012).
[8] Thomas G. Frongillo & Daniel K. Gelb, "It's Time to Level the Playing Field - The Defense's Use of Evidence from Social Networking Sites," (August 2010) (quoting a former Deputy District Attorney for Los Angeles County).



successful evidentiary findings. Facebook Timeline evidence could be used for questioning or impeaching the credibility, or even the character, of witnesses and suspects by proving acts or associations on or around a particular date. Both of these features assist attorneys in their hunt for relevant evidence by providing fast and accurate activity on the Facebook user's account.

As stated, Facebook is a world unto itself because vast numbers of people put their digital lives on the Internet. Defense attorneys need to use this "new confessional" in gathering information about their cases. If an attorney fails to utilize the abundant information that is publicly accessible on Facebook, then he or she is likely to be disadvantaged because the prosecution almost certainly will have probed it and will use it to prove the state's case.

Legal Ethics

Defense attorneys must grasp the "how to" of gathering evidence from Facebook in order to avoid ethical violations and the sanctions that often follow them. In order to gain access to Facebook accounts with privacy controls enabled, a Facebook user desiring this information must "friend" his or her target. Is it unethical for an attorney to "faux friend" another Facebook user?

The San Diego County Bar Association in 2011 reached an opinion that a lawyer may not make a friend request to a represented party without disclosing the lawyer's identity and the purpose of the friend request.[9] They concluded that no matter what was said and no matter in what form it was said, this gathering of information is impermissible if the person is represented. In contrast, the Bar of the City of New York Committee on Professional Ethics held in an earlier opinion from 2010 that a lawyer may not attempt to gain access to social networking sites under false pretenses.[10] They reasoned that, unlike the San Diego Bar Association, a lawyer can friend witnesses, but cannot use dishonesty, fraud, misrepresentation, or false statements of fact in doing so.

And finally, the Philadelphia Bar Association and their Professional Guidance Committee in a 2009 opinion[11] stated that a lawyer cannot get a third party to "friend" a non-party witness and also that lawyers may not use deception to obtain otherwise private information. The opinion cites a Colorado Supreme Court case, *People v. Pautler*, which holds, "Even noble motive does not warrant departure from the rules of Professional Conduct. . . . Purposeful deception by an attorney licensed in our state is intolerable."[12] The trend appears to be emerging that public information on any social networking site is fair game, but once an attorney or third party begins "friending" witnesses or represented parties to gather private information, then ethical considerations come into play.

In summary, lawyers must be aware of how they are obtaining Facebook evidence and must do so ethically and honestly. Make sure that the information is public or that you have not utilized deception in gathering it. To collect private Facebook profiles, a third party investigator or forensic examiner must also employ ethical means and sound tools and methods that can be used to authenticate social media evidence. Lawyers themselves should refrain from collecting this evidence in order to keep themselves out of the chain of custody and free of the need to testify to its foundation for admissibility.

Along with adhering to prevailing ethical opinions on obtaining evidence for their cases, attorneys must also observe legal ethics when they place material on their own social networking sites. Lawyers have received sanctions for putting confidential client information on their social media pages. An Illinois public defender was fired for ethical violations in connection with placing confidential client information on her social networking site.[13] Many lawyers have found themselves in similar situations due to the infancy of social media and their inexperience with it. The courts have not been consistent in their opinions dealing with ethics and social media across the states and federal districts, which lawyers need to be aware of when conducting evidence investigations via Facebook.

Besides paying attention to bar association opinions and accumulating case law in one's jurisdiction of practice, criminal defense attorneys also need to take note of Facebook contractually. Facebook's terms of service are explicit in their rules pertaining to honesty, integrity, identity, and confidentiality. An attorney's breach of Facebook's terms of service while obtaining evidence will most likely make that evidence inadmissible into the record. Therefore, all attorneys should know and adhere to Facebook's terms of service when conducting evidence investigations and they should consider their client's conformance, or lack thereof, when providing counsel and developing an evidence strategy for defending them.

Highlights of Facebook's terms of service follow and must not be breached by attorneys or their clients if admissibility of the resultant digital evidence is desired:

> Facebook users provide their real names and information, and we need your help to keep it that way. Here are some commitments you make to us relating to registering and maintaining the security of your account:
>
> - You will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission.
> - You will not create more than one personal profile.
> - If we disable your account, you will not create another one without our permission.
> - You will keep your contact information accurate and up to date.
> - You will not share your password.
> - You will not transfer your account. [14]

Conclusion

Attorneys need to be aware that the ethical treatment of social networking sites is still emerging and there are many wholly or partially divergent bar association opinions and case law across jurisdictions that impact how attorneys should go about avoiding ethical violations. That being said, lawyers should be wary of doing anything deceitful or dishonest, or exposing too much information, just as they would in their everyday dealings.

Facebook has exploded in popularity in the United States and is proving that it is here to stay with constantly changing improvements and statistical growth in users. Many prosecutors and law enforcement have already realized opportunities within Facebook to satisfy their needs for inculpatory social media evidence. Prosecutors are ahead of the game when navigating the privacy settings

[9] SDCBA Legal Ethics Opinion 2011-2 (May 24, 2011) available at http://www.sdcba.org/index.cfm?pg=LEC2011-2.
[10] Bar of City of New York: Committee on Professional Ethics, Formal Opinion 2010-2.
[11] Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02 (March 2009).
[12] People v. Pautler, 47 P.3d 1175 (Colo. 2002).
[13] See ABA Journal, "Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous" (Feb. 1, 2011) available at http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous.
[14] Facebook.com, http://www.facebook.com/legal/terms (last visited April 8, 2012).

of Facebook, sharing creative approaches for evidence collection, and maintaining adherence to emerging, applicable legal ethical standards. The time has come for defense attorneys to level the playing field with them and begin to realize the excellent opportunities Facebook affords them to mount an aggressive defense with social media evidence in every stage of the criminal process.

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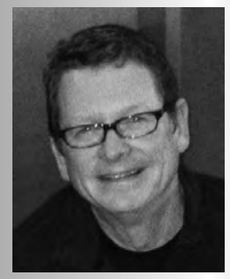

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United States v. Jones: Recalculating Fourth Amendment Jurisprudence

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The destination was the same for all nine Justices in *United States v. Jones*.[1] In a split, but unanimous decision, the *Jones* Court held that the government's attachment of a GPS device to the defendant's vehicle, and its use of that device to monitor the vehicle's movements for an extended period of time, constituted a search under the Fourth Amendment. The Court's reasoning, however, reflects that the Court may be at a crossroads on how to approach and identify a Fourth Amendment search.

In *Jones*, police installed a GPS device on the underbody of Defendant Antoine Jones' vehicle after he came under suspicion of drug trafficking. Police then tracked the defendant's movements for nearly a month. Based in part on data relayed back to police, the defendant was indicted and ultimately convicted of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine. Although the police had obtained a warrant to attach the GPS unit to the defendant's vehicle, they apparently could not be troubled to comply with its requirements; they installed it in the wrong state and outside those time frames set forth within the warrant. Thus, the Government conceded its noncompliance with the warrant and instead argued only that a warrant was not required in the first instance.

The Fourth Amendment endows the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Justice Scalia's opinion for the majority drives a textualist path in holding that a search occurred. Scalia states that since a vehicle is an "effect" within the meaning of the Fourth Amendment, the government's physical attachment of the GPS device upon the vehicle to obtain information constituted a "search." Scalia goes on to tie the common law, property-based principle of trespass to chattels in support of his reasoning:

> *The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures;" the phrase "in their persons, houses, papers, and effects" would have been superfluous.*[2]

Scalia acknowledges that the Court's more recent decisions have shifted from the property-based approach to the reasonable expectations standard; however, he makes it clear that the reasonable expectation standard as set forth in *Katz* and its progeny was not intended to usurp the property-based approach. Rather, it was intended to supplement it.

[1] *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2011), *cert. granted sub nom. United States v. Jones*, 131 S. Ct. 3064 (2011).
[2] *Jones*, slip op. at 4.

In *Katz v. United States*,[3] the Court held that the warrantless wiretapping of a phone booth conversation violated the Fourth Amendment. In that case, Justice Harlan explained the relevant inquiry is twofold, asking first whether the person has "an actual (subjective) expectation of privacy and, second, whether the expectation is one that society is prepared to recognize as reasonable."[4] Noticeably absent from Harlan's opinion is proof of trespass since quite plainly it could not be sustained in a setting involving a public telephone.[5] And indeed, *Katz* has been long believed to represent the sounding of the death knell for property-based Fourth Amendment jurisprudence.

In *Jones*, Scalia does not suggest that the test enumerated by the Court in *Katz* is no longer applicable. Rather, he states the Court need not apply the *Katz* test because a more fundamental violation occurred; namely, a physical intrusion on a constitutionally protected area by agents of the government seeking to obtain information.

Despite the government's argument to the contrary, Scalia easily distinguished the issue before the Court in *Jones* from the holding in *United States v. Knotts* and *Karo*, earlier "beeper cases."[6]

In *Knotts*, a beeper was placed into a container of chemicals used to manufacture narcotics by police. The container was then purchased by the defendant. Police used the signal on the beeper to track the container to an area surrounding the defendant's cabin. The Court held the Fourth Amendment was not applicable to the use of the tracking device in this situation. The Court reasoned that the defendant lacked a reasonable expectation of privacy in the movement of his vehicle on the public roadway. More specifically, because drivers convey their location and direction of travel to any observer on the open roadway, technology that merely enhances the ability of police in traditional surveillance does not encumber any reasonable expectation of privacy.

The Court in *United States v. Karo*[7] untied the possession issue left unanswered by *Knotts*. In *Karo*, the Court failed to find that an unconstitutional search occurred when police placed a beeper into a container with the consent of the original owner prior to the defendant taking custody of it.

Scalia placed considerable weight in the factual distinctions of "location" (*Knotts*) and "possession" (*Karo*) when distinguishing the facts of *Jones*.[8] Scalia argued "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."[9] Thus, it may have been appropriate for the Court to apply the *Katz* test in *Knotts* and *Karo*, but Scalia finds it unnecessary to do so based on the facts in *Jones*. This is, according to Scalia, because the facts in *Jones* directly demonstrate a trespass for the explicit purpose of monitoring the defendant's movement and subsequent long-term monitoring of that movement, and thus, traditional property-based Fourth Amendment jurisprudence squarely applies.[10]

The concurrence in the judgment, surprisingly penned by Alito, and joined by Ginsburg, Breyer, and Kagan, would have chosen to merely apply the *Katz* test; holding instead that a search occurred because it violated the defendant's reasonable expectation of privacy. Alito took issue with the majority's reasoning. First, he notes that the Court has long shifted from the application of the trespass-based theory in Fourth Amendment cases. Thus, Alito would give little weight to the attachment of the device itself and instead focus on the use of the device once attached. Secondly, Alito notes that had Jones not been considered a bailee (as the car was registered to his wife and the bailment occurred with the exchange of the key and prior to the installation of the GPS device), there would be no Fourth Amendment violation under the majority opinion even under facts that were hardly innocuous. Third, since property law is governed state-by-state, focus on trespass-based doctrine could lead to inconsistencies in the application of a constitutional principle. Finally, Alito foresees future cases where a *trespass* may not occur but the *same intrusion is realized* through purely electronic methods. For example, a pre-installed factory device or a stolen vehicle detection system may very well relay the same information; however, no physical trespass would have to take place for the Government to use these implements for monitoring a defendant's whereabouts. (In such circumstances where there is no trespass, arguably *Katz* would apply). In short, Alito finds the trespass-based approach much less adaptable to an ever-changing technological society.

Although not short on criticism of the majority approach,[11] Alito failed to offer any added guidance or do more than reiterate the vexing problems that changing technology will pose to future courts. Instead, he concluded, "the best we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated."[12]

The *Jones* opinion unquestionably resurrects prior precedent of the Court which used the property rights of the defendant as part and parcel of the analysis of some Fourth Amendment violations. No longer does the reasonable expectation standard stand as the sole measure of a recognized privacy interest. On the other hand, the Court's split interpretation together with ever changing technological advances make the continued viability of the majority's analysis one of questionable duration. Future opinions of the Court will likely shape the road that follows *Jones*.

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[3] *Katz*, 389 U.S. 347 (1967)

[4] *Id.* at 361 (Harlan, J., concurring).

[5] This point is of great significant to Alito in the *Jones* concurrence where he favorably observes that Katz did away with the old requirement of a trespass to support a Fourth Amendment violation.

[6] *Knotts*, 460 U.S. 276 (1983)

[7] *Karo*, 468 U.S. 705 (1984)

[8] Indeed, to the extent Jones relies upon the placement of a monitoring device on property over which the defendant has a property right, *Karo* and *Knotts* are immediately distinguishable. In both circumstances, the property came into the defendant's possession with the monitoring device already attached. In the words of Scalia, the defendant in *Karo* (and in *Knotts*) "accepted the container as it came to him, beeper and all . . ." This is a crucial distinction for Scalia who observed that Jones already "possessed the Jeep at the time the Government trespassorily inserted the information-gathering device, [and accordingly, was] on a much different footing.

[9] *Jones*, slip op. at 8.

[10] See *Jones*, n. 5: "trespass alone does not qualify, but there must be conjoined with that what was present here, an attempt to find something or to obtain information."

[11] Alito calls the majority's resort to the trespass jurisprudence "unwise," "straining the language of the Fourth Amendment," "without support in current Fourth Amendment law," and "highly artificial," all in a single paragraph unquestionably penned with a furrowed-brow.

[12] *Jones*, slip op. at 13 (Alito, J., concurring in the judgment)

Is *State v. Tanksley* Pissing You Off?

State v. Tanksley, 809 N.W.2d 706 (Minn. 2012)

Jeff Ring

Let's use the extreme example first. You drink until you are .22 and pass out in the bathroom. Morning comes, and your blood alcohol concentration is way under .08, your breath alcohol concentration is way under .08, you are unimpaired by alcohol, but your urine alcohol concentration is still over .20!

In the case of blood (and breath testing comes from molecules in the lungs passed through by the same blood), there is metabolizing going on—breaking down and getting rid of the alcohol. The liver and other good stuff do that for us.

But they use bladders in the desert to carry water for a reason. Bladders don't *do* anything. They just hold liquid, without metabolizing or breaking it down. Alcohol does not dissipate from the bladder until one evacuates the bladder by urinating.

So, why do we allow the State, through its police, to take a first-void urine test—a test from accumulated urine over time, and call it an accurate measure of our driving condition?

Thirty-nine states don't allow urine testing at all. Of the remaining eleven, only five allow a first-void urine test, and of that five, only two actually do it, with a third, Iowa, following an edict from their Commissioner that says that if the police report a first-void urine test, they must apply a ratio of grams of alcohol per 57 milliliters of urine, in converting urine sampling to "alcohol concentration," to get to whether or not the driver was .08 or greater, even though the law, the statute itself, defines it as "grams of alcohol per 67 milliliters." That is how unscientific a first-void urine test is!

The scientific community overwhelmingly supports the fact that a first-void urine test is a measure of an unknown time period of pooling of urine. It is not measuring our urine, but rather our *urines*.

The National Highway Traffic Association, (NHTSA), which sets up standardized field testing for police across the country and is an instrument of Law Enforcement, does *not* support first-void urine testing for something so serious as a DWI criminal charge.

SOFT, the leading Forensic Peer Reviewing organization condemns its use for this purpose.

Dr. A.W. Jones, Sweden's, and perhaps the world's, leading forensic scientist on alcohol and its effects on human beings and on the accuracy of measuring procedures and devices, condemns it as well. Even a former Minnesota Bureau of Criminal Apprehension (BCA) director wrote a piece condemning its use.

Ask a State's expert if he or she would rely on a first-void urine test in making a decision about the real condition of an emergency room patient? "Um, ah, well . . . if that is the only tool I had I might."

But when we go to Court (especially while the Breath Intoxilyzer was rarely used because its software was being challenged in the Supreme Court), the BCA sends in "experts" who swear that the first-void urine test is a good, accurate, and reliable measure of the driver's alcohol concentration.

That is an odd statement right there, since one has to define "alcohol concentration" first, even to talk about it.

To most of us, the mischief to be remedied in the DWI statute is driving impaired. That is why the statute defines "urine alcohol concentration" as the "number of grams of alcohol per 67 milliliters of urine." That is the blood-to-urine ratio in the human body. So, either a blood or urine test, then, would yield about the same result after applying the conversion in the statute. That ought to be close enough for Jazz, as we Classical snobs are wont to say, right?

The definition used for breath also reflects the average 2100-to-one ratio between a blood test and a breath test, by defining alcohol concentration as the "number of grams of alcohol per 210 liters of breath." Close enough for Jazz.

Allow me to explain in terms we all know. When you drink a beer, it goes into your gut. Alcohol gets in your blood, swirls around your brain, and starts to make you loony. That same alcohol-laden blood swirls around the membranes of your lungs, and passes through into the deep lung air at about 2100 to one.

So a breath test, using a simple conversion ratio, will tell us pretty close what would have been the true test of impairment—the blood result. That is how we know you are too loony to drive.

A .08 on the breath machine is enough to convict, because it would have been .08 on blood, or darned close. Same with urine. Since the ratio of blood alcohol to urine alcohol is known, it is plugged into the statute, and the conversion yields a result that would have been pretty darned close, indeed close enough, to what a true blood result would have been. *Except that only works if one evacuates the bladder by urinating, and then produces urine showing your level right now.*

Despite this apparent statutory intent to make a conviction rest on being impaired, and not on just which test the cop happens to choose, the Court just announced that the statute does *not* require any equivalency between the three types of test.

There is no intent in the statute to require that the urine test result be close, or even be related to, what would have been the result had a blood test been used, or a breath test, for that matter. This is the ruling, even though the mischief to be remedied is impaired driving, not just getting convictions.

When we fight this in Court, the BCA announces the urine test is "probably" the equivalent of what would have been a blood test (or a second-void urine test), though they are not able to say that this is true without knowing how long since the driver urinated, and several other variables. But they are willing to clothe their conclusion as "almost certainly true," when it is indeed utterly speculative, and they know it. And then, they will swear to the *opposite about the unknown variables with a first-void urine test*, when it suits their purposes.

When defense lawyers started a different challenge, arguing that the police should get telephonic search warrants before seizing urine samples under the Fourth Amendment's protections, the BCA helped the State win by swearing that they cannot do retrograde extrapolation (figuring out, by using burn-off rates, what the sample would have read earlier) to get the test within the legal 2-hour measuring requirement, because of all the unknown variables, so there is no time for a warrant to nail the driver for driving .08 or greater as measured within 2 hours of driving, which is what the law requires the State prove. *See Ellingson v. Commissioner*

of Public Safety, 800 N.W.2d 805 (Minn. Ct. App. 2011) *review denied 8-24-11.*

In other words, they need to get that sample now because they cannot go beyond 2 hours and then calculate backwards on a first-void urine, *blaming the same unknown variables they earlier swore were nothing to worry about when they came to Court to say first-void urine tests are just fine, the variables are not worth worrying about.*

The BCA does agree with all the world's scientists that a first-void, pooled, urine test is not a snapshot of the driver's current condition to drive. They say it might be, and again clothe the testimony in language that attempts to belittle the likelihood that the variables would make much difference. They really don't have any idea in any specific case, because they don't have any facts—they don't know how much it has pooled. But unlike most expert testimony in a court of law, in DWI, they get to speculate.

So, two states in the union continue to use this testing procedure to visit on people the incredible consequences and public opprobrium that comes with a DWI. (Have you filled out a job or insurance application lately? Have you tried to go to Canada to fish lately?)

We are now accepting in Court that it is admittedly junk science to try and say what a urine sample would have read earlier, after 2 hours have passed, thus our Fourth Amendment search warrant protections must give way to this clear exigency, but then those same scientific principles may be ignored for convicting someone tested within 2 hours. Hmmm.

The High Court noted that in some states they define "urine alcohol concentration" as "Blood alcohol concentration as measured by the number of grams of alcohol in 67 milliliters of urine." Our statute does not mention the blood part. So, the Court concluded, there was no intent to have a urine test procedure that yields results that have something to do with what *would have been* a blood test result?

But then why use the number 67 in the definition for urine alcohol concentration? Its only relevance is the blood/urine comparison. Why use the number 210 for in the definition for breath alcohol concentration? Its only relevance is the blood/breath comparison. Did they pull these numbers out of thin air?

It is clear that the mischief to be remedied is impaired driving, and thus there is an intent to require the government to use a procedure that assures we obtain a result that is the closest we can to what would have been a blood test, when we test breath or urine, so the poor driver is not convicted on bad science, but rather, is convicted for really being too impaired to drive. Right? Wrong.

The Court ruled the earth is indeed flat. For now, two states in the union do not care whether or not your urine test is a snapshot of your current real condition to drive.

The Minnesota Supreme Court has ruled that the Minnesota Legislature did not intend there be *any* connection in a urine test result, to what would have been a blood test result. The numbers 67 and 210 are not part of their intent, and the mischief to be remedied is not impaired driving, but being .08 on the type of test the cop chooses.

But Quaere this: If the Court is correct that the legislature never intended even a close parity between blood, breath, and urine tests, why did they give us a right to get an independent test in the same statutory scheme? If the State used a breath test, we cannot get another breath test anywhere. If the State used a first-void urine test, we cannot get another first-void urine test relevant to the first one. We already voided. If the driver gets a blood test immediately after the first-void urine test, and the blood test result is way under .08, is it irrelevant to use that blood test to impeach the urine test, since they do not have to correlate.

Currently, this state neither cares whether the first-void urine result really is pretty darned close to what would have been a true blood reading (or a second-void urine reading) *nor whether or not the first-void urine test actually reveals the driver's true condition to drive.*

So, despite using the proper blood ratios in the definitions, and despite the BCA's admission that they cannot wait for a phone warrant to vindicate your Fourth Amendment rights because they have no idea of the variables needed to calculate backwards if we go past 2 hours, those same unknown variables are irrelevant when it suits their criminal or license revocation case, and a .08 first-void urine conviction or license revocation is valid, reliable, *and fair*. Even if blood would have exonerated you, and even if we know it!

No serious scientist in the entire world honestly believes the first-void urine test is accurate and reliable in the sense that it addresses the real mischief to be remedied—drunk driving. Some will say, "Maybe it does," but they do not know that it does.

More to the point, in such a high stakes arena, *they know that they do not know whether it reflects impairment.* But in this state, it does not matter, even if it is not accurate and reliable, if "accurate and reliable" means: "*This is a urine test result that is close to what would have been a blood result, and that would have really told us this driver's true condition to drive.*"

We are left with an allegedly accurate and reliable measurement of something that we do not know matters. Was the driver impaired? No idea. But we got him to take urine so we nailed him, even if he truly was unimpaired, and even if blood or breath would have exonerated him.

So for those of us who love Jazz as well as Classical, and know that what the snobs call "close" in Jazz was actually the sought-after effect, this is not close enough for anything. This is not an artful science. This is not what the legislature was after, and if it is, then it is absurd.

We saw the same inscrutable and unhelpful use of terminology, and the same willingness to use apparently differing definitions when it suits the result, when we litigated challenges to the very real manipulation and unequal treatment in past Breath Testing cases.

Consider, for a moment, the rulings in *Weierke v. Commissioner of Public Safety*, 578 N.W.2d 815 (Minn. Ct. App. 1998); *Brooks v. Commissioner of Public Safety*, 584 N.W.2d 15 (Minn. Ct. App. 1998); and *State v. Rader*, 597 N.W.2d 321 (Minn. Ct. App. 1999). In those cases the drivers complained about police manipulating a breath test to get higher readings.

The BCA actually trains officers to shout: "Keep blowing, keep blowing," on and on, when the driver is blowing into the machine—even after the LED readout on the breath machine has indicated to the officer that an adequate sample has already been obtained for testing.

Blowing harder and longer gets one closer to the deep, alveolar, lung air—closer to the area where molecules of alcohol are passing through into the lungs; thus usually, blowing longer will mean a higher reading. The drivers complain that by being forced to keep blowing beyond what the machine labeled an *adequate sample*, they are being manipulated into higher results, and they are being treated differently from each other.

The Commissioner, under the authority granted by law, specified that for breath, an "adequate sample" is 1.1 liters of air blown at 6 pounds of water pressure. That is the same for everyone, *and the machine lets the operator know when that has been reached*.

But people with identical alcohol concentrations yield completely different results depending on the cop's behavior. Does the cop stop at an adequate sample, or at a good enough effort thereafter, or insist on a blow

to the bitter end?

In rejecting the manipulation and unequal treatment claims, the Court said some interesting things. First, the *Weierke* Court wrote:

> More specifically, appellant has not shown that a quantity of breath greater than the minimum adequate sample produces a higher alcohol concentration result, or that it inaccurately reflects the *actual alcohol concentration in the body*.

(Emphasis added). Actually, nearly all experts—and cops—agree a deeper sample will produce a higher result. Why else are the police taught to shout "Keep blowing," even long after the LED readout has informed them that the sample was already adequate for testing?

But what did the Court mean when it said the Appellant (that's the driver) did not prove that a quantity difference in the sample "*. . . inaccurately reflects the actual alcohol concentration in the body.*" What on earth is "actual alcohol concentration in the body"? Doesn't this mean we really are after an indication of how drunk the person is? Doesn't this mean we are seeking "actual alcohol concentration" in the sense that the deeper breath test sample is closer to what would have been obtained had this been a real blood test?

The *Brooks* Court wrote something interesting as well. They said:

> It would be an absurd result if we were to agree that the sample result displayed at the time the machine registers zero [registering zero on the LED readout means an adequate sample for testing has been supplied] could constitute a test result for purposes of revoking a driver's license. *Testimony indicated that the most accurate reading comes from the deep-lung air.* There is no showing this first zero sample would provide the *desired accurate and reliable measurement of the alcohol concentration, or that it measured the alveolar or deep-lung air sought.* A proper test result may be obtained only by following the procedures set out in the statute and regulations, and appellants cannot prevail.

(Emphasis added). Wow! The statute doesn't say "*Keep blowing*." It says the Commissioner is to set a standard, and the Commissioner did. It was 1.1 liters at 6 pounds of water pressure. But, what does "*the most accurate reading*" mean? More accurate than what?

Apparently, when it comes to the issue of police manipulating us up to a higher test result, that is fine since the deep alveolar lung air is what we are after, even if an *adequate sample* has not gotten us there, and then we will arrive at the "*desired accurate and reliable measurement of alcohol concentration*."

What are they talking about? According to their *Tanksley* decision, the very term "alcohol concentration" does *not* mean what a blood test would have revealed, and no such comparable result is "desired" in the statute. What, then, is the "*alcohol concentration*" the Court thinks is desired by our statute in the deep alveolar lung air as opposed to the "absurd" result obtained by a merely "*adequate sample*"?

The *Brooks* Court had already held that the Commissioner of Public Safety is the recognized authority to set up this machine and its procedures, and we already know that, despite the fact that the machine labels a sample as "adequate for testing" (based on the way the Commissioner set it up). The Court still said: "*There is no showing this first zero sample would provide the desired accurate and reliable measurement of the alcohol concentration, or that it measured the alveolar or deep-lung air sought.*"

We will just skip over the question as to how the machine, that tells us it <u>*has*</u> an adequate sample based on the Commissioner's own specifications, is not a showing that the sample would yield the *reliable measurement of alcohol concentration sought*. That is just too stupefying to analyze. If it is adequate, then it, by definition, is yielding the *desired accurate and reliable measurement of alcohol concentration*."

But this writer can understand why the Court allows the police to seek a sample greater than the minimum adequate sample; at least if that is an attempt to get to what the "actual alcohol concentration" is, and by that I mean, *what would be comparable to what would have been a blood result.* Then, we would be trying to learn how impaired the driver really was.

Otherwise, <u>*any*</u> result beyond what the Commissioner specified for adequacy, by definition, gives the *desired alcohol concentration*, even if it would have been different if one blew longer. Each person blows a whole bunch of alcohol concentrations each test! *Tanksley* makes the idea of *alcohol concentration* meaningless, since it has nothing to do with what would have been a blood result, nor does it have anything to do with how impaired the driver is. What was the mischief to be remedied again?

So unfair manipulation aside, *why isn't an adequate sample adequate*? Why is relying on that "*absurd*"? The answer of course, is because they want that deep lung air sample, the one that is comparable to what would have been a blood result. *The one that shows us how impaired the person is.* The breath manipulation cases were on the right track. They saw that the legislative desire is to learn how impaired the driver really is. *State v. Tanksley* obliterates that statutory intent.

Then, in a subsequent breath case, the two parties actually stipulated that by making one blow longer into the machine, it *will* cause a higher result. So lack of proof on that issue was no longer available to duck the real questions of manipulation and unfairness.

The case was *State v. Rader*, 597 N.W.2d 321 (Minn. Ct. App. 1999). Nevertheless, the Court wrote:

> *Even though the parties stipulated that the alcohol concentration continues to rise as a driver blows past the point the Intoxilyzer indicates an adequate minimum sample*, Rader has not demonstrated that the test result measured an amount above his *actual alcohol concentration* or that the result was not consistent with the statutory mandates. Like the defendant in *Weierke*, Rader "has not shown that a quantity of breath greater than the minimum adequate sample inaccurately reflects the *actual alcohol concentration in the body*." *Weierke*, 578 N.W.2d at 816.

(Emphasis added). Well, they stipulated that alcohol concentration keeps going up, even after an adequate sample, when one keeps blowing. What didn't the driver prove?

But we keep begging the same question: What on earth is "*actual alcohol concentration in the body*"? After all, that is, according to all three breath cases, what we are after. *The actual alcohol concentration in the body.* It certainly sounds as if the goal is to measure how impaired the driver was.

Question: How many different alcohol concentrations are there in one body at any given time? *Answers:* For breath the number is nearly infinite, depending on the blow. If the sample was at least *adequate*, every different result is the "*actual concentration of alcohol in the body*," I guess. For urine, it is completely unpredictable if it is a first-void sampling. For blood, it is the real deal.

Aren't we after the real deal regardless of what test is chosen? Isn't that why they used 67 and 210 in the definitions for urine and breath alcohol concentration, respectively, in the statute? Or are they saying they do not care whether the driver may have blown a dozen different levels depending on how he or she blew? Then it is fair to ask, which one is the *actual alcohol concentration in the body*?

Indeed, since a minimum sample simply does not get us to that magic concentration we are seeking from deep lung air, and since

one could almost always have blown just a scootch more, then, by this logic, we never get anyone's actual alcohol concentration in the body, ever! Why would a harder than minimum blow even be enough? There was always a harder one available.

So, my real point is that, when it comes to forgiving the obvious manipulation that can and does occur in breath testing, the Court is way into the notion that there is one thing known as the "*actual alcohol concentration in the body*." Let's get that deep lung air that is closest to what would have been a blood test result—that shows us how impaired the driver is—that is in line with the mischief to be remedied.

And, for that one brief, shining moment, when the Court said, " . . . *Rader has not shown that a quantity of breath greater than the minimum adequate sample inaccurately reflects the actual alcohol concentration in the body* . . . ," our Court finally has all but screamed out that there is such a thing as "alcohol concentration," and that it is one thing, not many things—it is a measurement of one's condition to drive.

This Eureka moment survives in the real world only so long as a Higg's Boson—actually here for real, but gone in a flash of pseudo science, to accomplish the goal of convicting anyone we can.

So, despite this precedential insight in the breath cases, when it comes to first-void urine testing, that concept—that goal of finding "*real alcohol concentration*"—disappears. It is irrelevant. It does not matter if the blood test or breath test or second-void urine test on the identical person at the identical moment in time would have produced a completely different "*actual alcohol concentration in the body*."

Why does everything in your future turn on what type of test the cop chose? Why mention 67 and 210 in the definitions of alcohol concentration? Why is there even a right to an independent test if it is meaningless? Why convict people and brand them for life with the Scarlet D, when we know, to a scientific certainty, *that we do not know*, to a scientific certainty, that they deserved it?

Jeffrey B. Ring has practiced over 25 years in the DWI area. He first spent 10 years prosecuting these cases in Hennepin and Freeborn Counties, and for over 15 years he has vigorously defended DWI cases. He is known for winning a wildly disproportionate share of license revocation cases for his clients. He has secured landmark wins in the Court of Appeals, changing and defining the law, and he is asked several times a year to teach other lawyers how to defend and win DWI cases at seminars and workshops. He has defended literally thousands of accused drivers, and they, along with police, prosecutors, and other lawyers, are the major source of his referrals. His well-known battle cry is now a legend in legal circles in Minnesota: "*I don't judge you, I don't lecture you—I defend you!*" He is past president of the *Minnesota Society for Criminal Justice*. He is a lifelong Minnesotan, graduating in 1977 from the University of Minnesota Law School, and is a member of both the State and Federal bars.

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Intent in Assault Crimes: *State v. Fleck* and a Distinction Reached Accidentally on Purpose

Adam T. Johnson

One day, night to be exact, the Baron Mouldycastle found himself, in accordance with a strict diet, engaged in an intense acquaintanceship with a bottle of Pimm's No. 6 Vodka. Why a person with a baronage in Minneapolis? Well, it is simply more interesting than calling him Tom Tiddler. In any event, the Baron had fallen quite severely on the bottled lightning, had lost all possession of limb and faculty in consequence of the same, and was in the midst of a miserable crawl in front of the Guthrie on his way to the Stone Arch Bridge, whereat he planned to amuse himself by the fiddle. All of a sudden, a small party of apparent larcenists crossed paths with the Baron (they were, in fact, soot-covered Londonite extras from a then-ongoing production of *A Christmas Carol*). The Baron took fright when faced with the prospect of violence to his person and the coincident operation on his purse. What to do? thought he. Instantaneously (and quite obviously intentionally), the Baron whirled around and flew from the impending gang. Indeed, the Baron took flight so precipitously and with such absence of alacrity, that no sooner had he gone three and three-quarters steps, than he smashed his face into that of an innocent woman in a mink cape and diamond-studded brooch, which impact caused her nose to break directly. The Baron was subsequently charged with an assault crime, tried and convicted. The prosecutor was not required to show that the Baron intended to cause injury to the woman. How came this assault conviction to stand? *State v. Fleck*.[1]

On the day after Valentine's Day, 2012, the Minnesota Supreme Court rendered an important decision in a case involving a man who stabbed his girlfriend with a 12-inch butcher knife and tried to kill himself. The court was tasked with deciding whether a person charged with an assault committed by the intentional infliction of bodily harm is entitled to a jury instruction on voluntary intoxication: in other words, whether such a person would be allowed to present evidence to a jury that he was so intoxicated that he could not have formed the intent necessary for the commission of the crime. In resolving inconsistencies in a line of cases, the supreme court concluded that such a person is not entitled to the voluntary intoxication jury instruction (and by consequence, not entitled to the defense) with respect to an assault-harm prosecution.

Assault

There are many types of assault crimes in Minnesota: a thrown wine glass that does or does not make contact with an in-law, a punch in a tavern over a disputed turn at Buck Hunter, a husband or wife kicked down stairs, bleach dumped on one by another, a bite mark on a club bouncer's calf after a body slam, a weed-whacker flailed about by a

[1] 810 N.W.2d 303 (Minn. 2012).

besotted neighbor, a bus stop thief threatening powder and shot, a fistic teenager bullying down a school hallway, etc. Doctrinally, there are two basic forms of assault: assault that causes fear in another person and assault that causes physical harm to another person. We might adopt the supreme court's terminology and observe the offenses as "assault-fear" and "assault-harm." A person commits the former through "an act done with intent to cause fear in another of immediate bodily harm or death." (The thrown wine glass that misses a forehead.)[2] A person commits the latter through "the intentional infliction of . . . bodily harm upon another." (The bitten bouncer, poor fellow!)[3] Note that both offenses include an element of intent.

Intent

There are many types of intent: manifest intent, testamentary intent, transferred intent, and even original intent if one can take the liberty of invoking a Framer. For the purposes of this article, I am concerned with "specific intent" and "general intent"—the quality of the mental states attendant on certain criminal offenses. In criminal law, "intent" generally describes a conscious effort to bring about a certain result.[4] In Minnesota, when criminal intent is an element of a crime, "such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe'."[5] "Intentionally" means "that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result."[6] "With intent to" or "with intent that" "means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result."[7]

"Specific intent" means that the defendant acted with the intent to produce a specific result, whereas "general intent" means only that the defendant engaged in prohibited conduct.[8] According to Professor LaFave, general-intent requires only an "intention to make the bodily movement which constitutes the act which the crime requires."[9] In other words, a general-intent crime only requires proof that "the defendant intended to do the physical act forbidden, without proof that he meant to or knew that he would violate the law or cause a particular result."[10] Contrast that with a specific-intent crime, which requires the "intent to cause a particular result."[11] Unlike a general-intent crime, a specific-intent crime includes "a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime."[12] The distinction is an important one, because the particular defendant will or will not be allowed the defense of voluntary intoxication depending on the general or specific nature of the intent element of an offense.

Voluntary Intoxication

Pursuant to statute, "[a]n act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind."[13] To receive the voluntary intoxication jury instruction: "(1) the defendant must be charged with a specific-intent crime; (2) there must be evidence sufficient to support a jury finding, by a preponderance of the evidence, that the defendant was intoxicated; and (3) the defendant must offer intoxication as an explanation for his actions."[14] If a defendant demonstrates the foregoing elements, the district court must give the instruction.[15]

State v. Ronald Gene Fleck

At approximately 1:00 a.m. on January 23, 2009, K.W. returned to a home she shared with Ronald Gene Fleck and found Fleck in the kitchen, deep in liquor. According to K.W., Fleck had been drinking for half a fortnight without interruption. As she repaired to the bathroom, K.W. heard her name called, and turned around to discover Fleck standing near her with a butcher knife. Fleck then stabbed K.W. once near her shoulder via an overhand motion. K.W. locked herself in the bathroom and called 911. Meanwhile, Fleck called his brother and sister-in-law, informed them of the stabbing, and conveyed designs on his life. Upon the arrival of officers, Fleck was uncooperative and belligerent (in other words, there was not tea set out). A subsequent chemical test revealed a blood alcohol level of 0.315. Fleck was later charged with second-degree assault with a dangerous weapon, which crime references the two types of assault discussed above (assault-fear and assault-harm).[16] Before trial, Fleck gave notice that he would be relying on voluntary intoxication as a defense, and specifically requested an instruction to that end. The district court instructed the jury that voluntary intoxication applied to the assault-fear offense, but not to the assault-harm offense. The jury found Fleck guilty of second degree assault-harm and not guilty of second-degree assault-fear.

A unanimous panel of the court of appeals reversed Fleck's conviction and remanded for a new trial, holding as prejudicial error the district court's refusal to give the voluntary intoxication instruction anent the assault-harm offense, and specifically concluding that assault based on the intentional infliction of bodily harm is a specific-intent crime.[17] On review, the supreme court reversed, holding that assault-harm is a general-intent crime.[18] Fleck's conviction was reinstated.

Before *Fleck*, the courts had never squarely ventured to bifurcate the crimes of assault along general- and specific-intent lines. Indeed, the supreme court had previously stated flat out that assault is a specific-intent crime, recognizing no distinction between assault-fear and assault-harm.[19] The most obvious problem post-*Fleck* exists in the unavoidable effect of its holding: if one swings at another and misses, one is entitled to the intoxication instruction; if one swings at another and succeeds in making contact with the object of their attack, the intoxication instruction is unrealizable. However, before discussing the problems of future blows, it is appropriate to address the analytical and jurisprudential underpinnings of the supreme court's decision. The touchstone of the court's inquiry engaged the general- versus specific-intent question. Accordingly, I have foregone a comprehensive evaluation of whether *Fleck* maintains a fidelity to stare decisis, and have centered the analysis on the supreme court's interpretation of statutory language and its inquiry into the legislature's intent (a pun as dreadful as the Mann Act, I own).

The thrust of the court's decision in *Fleck* is centered on the legislature's particular choices in words, viz. the purported difference between "with intent to" and "intentionally." The court noted that the phrase "with intent to" is commonly used by the legislature to express a specific-intent requirement.[20] For this proposition, the court cited to the statute that provides, "[w]hen criminal intent is an element of a crime in [Minn. Stat.

[2] Minn. Stat. § 609.02, Subd. 10(1).
[3] Minn. Stat. § 609.02, Subd. 10(2). "Bodily harm" means "physical pain or injury, illness, or any impairment of physical condition." Minn. Stat. § 609.02, Subd. 7.
[4] 9 Minn. Prac., Criminal Law & Procedure § 442 (3d ed.).
[5] Minn. Stat. § 609.02, Subd. 9(1).
[6] Minn. Stat. § 609.02, Subd. 9(3).
[7] Minn. Stat. § 609.02, Subd. 9(4).
[8] *State v. Vance,* 734 N.W.2d 650 (Minn. 2007).
[9] 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e) (2nd ed. 2003).
[10] 9 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice - Criminal Law and Procedure* § 44.3 (3rd ed. 2001).
[11] Id.
[12] LaFave, *supra,* § 5.2(e).
[13] s Minn. Stat. § 609.075.
[14] *Id.* at 616.
[15] *Id.*
[16] *See* Minn. Stat. §§ 609.222, Subd. 1; 609.02, Subd. 10.
[17] *State v. Fleck*, 797 N.W.2d 733, 738 (Minn. Ct. App. 2011).
[18] *Fleck,* 810 N.W.2d 303.
[19] *State v. Edrozo,* 578 N.W.2d 719, 723 (Minn. 1998); *State v. Vance*, 734 N.W.2d 650, 657 (Minn. 2007).
[20] *Fleck*, -- N.W.2d, slip op. at 3.

ch. 609], such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'"[21] The court also cited to *State v. Mullen* for further support.[22]

Interestingly, *Mullen* supports a holding contra the supreme court's in *Fleck*. In *Mullen*, the supreme court was tasked with deciding, among other things, whether the stalking statute governing a pattern of harassing conduct required specific-intent.[23] Notably, the statute included the phrase "in a manner that" without any mention of "intentional conduct."[24] The court ultimately ruled that the offense was a general-intent crime.[25] In so holding in *Mullen*, the court relied heavily on *State v. Orsello*, where the court had concluded that the two phrases "intentional conduct" and "in a manner that" appeared to indicate an intent requirement *greater* than simple general-intent.[26] In discussing the *Orsello* case, the *Mullen* court stated as follows:

> We concluded that while none of the language that references specific intent was present in section 609.749, such as 'intentionally,' 'with intent to,' or 'know,' the legislature must have intended to require specific intent because of the 'peculiar drafting' of subdivision 1, using the phrase 'intentional conduct in a manner that,' and subdivision 2 listing descriptions of conduct that constitute stalking without reference to their criminal code counterparts.[27]

In *Fleck*, the court undertook the painfully semantic measure of separating "with intent to" from "intentionally" without a convincing reason. The casual observer notes "with malice" and "maliciously," "with envy and "enviously," "with regret" and "regrettably," "with sorrow" and "sorrowfully," "with industry" and "industriously," "with earnest" and "earnestly," and wonders how on earth it is that "with intent" and "intentionally" are treated in such a singular manner (or "so singularly"). Behind such a distinction between "with intent to" and "intentionally," one envisions the legislative floor record as follows: "Well, no, humph, would the Right Honorable gentleman from Grand Rapids explain his self?" "Of course, madam, I thankee. We don't consider 'intentionally' to mean '*intentionally*.' Rather, we consider 'intentionally' to mean '*intentionally*,' in accordance with its plain meaning. Mind you, 'intentionally' doesn't *always* mean 'intentionally' but only when an act is committed '*intentionally*.'"

Above and beyond the word play, *Fleck* is uniquely inconvenient as precedent. In constructively rejecting the well-reasoned merits of *Mullen* and *Orsello*, the court in *Fleck* concluded that with respect to assault-harm, the

> forbidden conduct is a physical act, which results in bodily harm upon another. Although the definition of assault-harm requires the State to prove that the defendant intended to do the physical act, nothing in the definition requires proof that the defendant meant to violate the law or cause a particular result.[28]

If the reader is thinking that sounds a lot like it would include the negligent infliction of bodily harm, the reader is probably correct. Imagine for a moment the errant toss of a baseball that misses a friend's mitt and scores a blow to the face of a passerby. Assault-harm? Under *Fleck*, unavoidably yes: thrown baseball (generally intended physical act) resulting in a bruise to a distant cheek (bodily harm upon another) without the required proof that the ball tosser "meant to violate the law or [even] *cause* a particular result.[29] Note that in the absence of a specific-intent requirement, the little leaguer has just committed an assault crime. We of course would hope for prosecutorial discretion in such an instance, but what of the more difficult case?

Because of the breadth of conduct potentially within the auspices of a general-intent assault-harm statute, there is a strong case that the crime of assault-harm, as it reads post-*Fleck*, suffers from unconstitutional vagueness. A law is impermissibly vague when it fails to draw a reasonably clear line between lawful and unlawful conduct.[30] As generally stated, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[31] An assault-harm offense requiring only a general-intent has all the predictability of the color of plumage on the Phoenix. If an intentional bodily movement that happens to cause physical harm to another person is now all that is required to prove the crime of assault-harm, a great deal of patently innocent conduct is by definition criminal. The *Fleck* decision essentially removes from the statute the entire *mens rea* element but for the mental state of acting volitionally in some minimal manner with no reasonable nexus to the resulting harm.

Conclusion

The court in *Fleck* might have disposed of the case in accordance with the rule of lenity. By that rule of interpretation, a statute lacking a clear statement of the level of intent required (i.e. one that requires wrestling over "with intent to" and "intentionally") must be resolved in favor of lenity: in *Fleck*, to require specific-intent.[32] As presently interpreted, the assault-harm offense stands to subject a host of innocent conduct to criminal liability. This the legislature must *not* have intended.

[21] *Id.*
[22] *Id.* (citing *State v. Mullen*, 577 N.W.2d 505, 510 (Minn. 1998)).
[23] Minn. Stat. § 609.749, Subd. 5 (1998).
[24] The statute has been subsequently amended to include the phrase "knows or has reason to know".
[25] *Mullen*, 577 N.W.2d at 510.
[26] *State v. Orsello*, 55 N.W.2d 70, 74 (Minn. 1996).
[27] *Mullen*, 577 N.W.2d at 510 (citing *Orsello*, 554 N.W.2d at 73-74).
[28] *Fleck*, -- N.W.2d, slip op. at 4.
[29] *Id.* (emphasis added).
[30] *Smith v. Goguen,* 415 U.S. 566, 574-78 (1974).
[31] *Kolender v. Lawson,* 461 U.S. 352, 357 (1983).
[32] *See Liparota v. United States,* 471 U.S. 419, 427 (1985).

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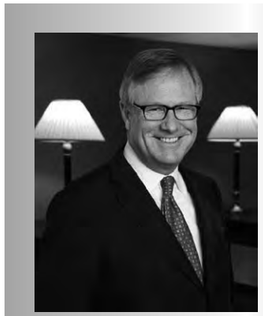

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